SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

FILED

October Term, 1970.
No. 70-7

MARTIN-MARIETTA CORPORATION; and SIX POINTS LUMBER & SUPPLY COMPANY, dba O'DELL-GARDNER-GATEWAY CONCRETE PIPE COMPANY,

Petitioners,

vs.

MARICOPA COUNTY,

Respondent.

Supreme Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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MARTIN-MARIETTA CORPORATION; and SIX POINTS LUMBER & SUPPLY COMPANY, dba O'MALLEY-GANNAWAY CONCRETE PIPE COMPANY,

Petitioners,

vs.

MARICOPA COUNTY,

Respondent.

Separate Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Martin Marietta Corporation and Six Points Lumber and Supply Company, dba O'Malley-Gannaway Concrete Pipe Company, defendants below, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit, entered August 28, 1970, affirming by a divided panel the District Court's decision denying petitioners' alternative motions to dismiss and for summary judgment. This Petition is based upon the grounds that the Ninth Circuit's decision (1) is in conflict, on an important and recurring federal question, with decisions of other Circuits, (2) extrapolates improperly from decisions of the Supreme Court and thereby reaches a

conclusion at odds with congressional purpose on a question that has not been, but should be, decided by the Supreme Court, and (3) raises a grave constitutional question of due process of law. (Supreme Court Rule 19.)

Opinions Below.

The opinion of the District Court for the District of Arizona is reported at 304 F. Supp. 279 and annexed as Appendix A to this Petition. The opinion of the Court of Appeals for the Ninth Circuit has not yet been officially reported, but a copy of that opinion is printed as Appendix B to this Petition.

Jurisdiction.

The order of the Court of Appeals for the Ninth Circuit was entered on August 28, 1970 (Appendix C). Petitioners' Petition for rehearing was denied by order of the Court of Appeals entered on October 26, 1970 (Appendix D). The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

Applicability of 28 U.S.C. Section 2403.

Pursuant to Supreme Court Rule 33(2)(b), petitioners state that Section 28 U.S.C. §2403 may be applicable in that this Petition draws into question the constitutionality of an Act of Congress—Section 5(b) of the Clayton Act, 15 U.S.C. §16(b), as interpreted by the Ninth Circuit's decision in this case. No Court below has certified to the Attorney General the fact that the constitutionality of Section 5(b), as interpreted, is drawn into question.

Questions Presented.

Does the pendency of prior Federal Government antitrust proceedings operate under Section 5(b) of the Clayton Act to toll the running of the Statute of Limitations for private treble damage actions as to persons who are named as defendants in a subsequent private treble damage action but who were in no way involved in the prior Government proceedings?

If the pendency of Federal Government antitrust proceedings suspends the running of the State of Limitations for private treble damage actions as to persons in no way involved in those proceedings, are such persons denied property without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

Statutes and Constitutional Provisions Involved.

The issue raised in this case involves Sections 4(b) and 5(a) and (b) of the Clayton Act (15 U.S.C. §§15b, 16(a)), and the Fifth Amendment to the Constitution of the United States.

Section 4(b) of the Clayton Act, 15 U.S.C. §15b, reads:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 5a and 16 of this title shall be revived by said sections."

Section 5 of the Clayton Act, 15 U.S.C. §16, is as follows:

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, that whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of the Case.

1. The Facts and the Proceedings Below.

Plaintiff-respondent, Maricopa County, filed this action against defendants-petitioners on April 15, 1969. The complaint alleged a conspiracy in violation of Sections 1 and 2 of the Sherman Act "commencing in or about the year 1954" and continuing to at least "sometime in the year 1962" [Tr. p. 11]. Among the defendants named in the action were Martin Marietta Corporation and Six Points Lumber & Supply Co., dba O'Malley-Gannaway Concrete Pipe Co., hereinafter called Martin Marietta and O'Malley-Gannaway. Because the action brought by plaintiff-respondent was filed substantially later than four years after the action is alleged to have accrued, defendants filed alternative motions to dimiss and for summary judgment upon the grounds that (1) plaintiff's claims are barred by the four year Statute of Limitations provided for treble damage actions by Section 4B of the Clayton Act,

15 U.S.C. §15(b), and (2) the running of this Statute is not tolled under Section 5(b) of the Clayton Act by reason of the pendency of Federal Government proceedings.

In resisting these motions, plaintiff-respondent relied on a number of Federal Government criminal and civil actions which were filed commencing in 1964 [Tr. Separate Volume Containing Affidavit of Jesse R. O'Malley with exhibits]. But petitioners Martin Marietta and O'Malley-Gannaway were not named, mentioned, or in any way involved in any of these Government proceedings. Nevertheless, relying on the claimed tolling effect of the prior Government proceedings, the District Court denied the alternative motions to dismiss and for summary judgment, but certified the questions raised by the motions under title 28 U.S.C. §1291(b) for interlocutory appeal [Tr. p. 279]. The Court of Appeals for the Ninth Circuit subsequently granted leave for such interlocutory appeal [Tr. p. 284].

The District Court opinion denying defendants-petitioners' alternative motions classified the grounds asserted in support of their motions into nine separate categories (Appendix A at 4-6). This Separate Petition considers *only* the fifth of the District Court's categories (Appendix A at 5-6), which consists of the argument that the various Federal Government civil and criminal actions cannot have tolled the running of the Statute of Limitations as to Martin Marietta and O'Malley-Gannaway since neither were ever named or "complained of" as defendants or as co-conspirators in those proceedings. This issue is raised separately in this Separate Petition because it is applicable only to Petitioners Martin Marietta and O'Malley-Gannaway, and not to other defendants-petitioners herein. The remain-

ing grounds in support of defendants-petitioners' position that plaintiff-respondent's suit is barred by the Statute of Limitations are common to all defendants-petitioners and are raised by a Petition for Certiorari filed on behalf of all other defendants. Accordingly, defendants-petitioners Martin Marietta and O'Malley-Gannaway join in the Petition for Certiorari being filed by the other defendants in this action and specifically adopt by reference such Petition in its entirety.

On interlocutory appeal, the Court of Appeals for the Ninth Circuit affirmed the District Court's decision and thereby rejected each and every argument presented by defendants-petitioners in support of their alternative motions. (See Appendix B at 25). But on the question raised in the present Petition by Martin Marietta and O'Malley-Gannaway, and on that question alone, the three-judge Ninth Circuit panel was divided, Judge Hamley dissenting from the majority's rejection of the position asserted by defendants-petitioners herein. (*See* Appendix B at 26.) Petition for rehearing was denied. (Appendix D).

2. Reasons for Granting Certiorari.

Certiorari should be granted in this case for three reasons. First, the Ninth Circuit's decision in this case is in direct conflict with decisions of other Circuits on a recurring and important question in the administration of the federal antitrust laws. Certiorari has already been granted to review the decision of the Seventh Circuit in *Hazeltine Research, Inc. v. Zenith Radio Corp.*, 418 F.2d 21 (7th Cir. 1969). One of the questions raised in the *Hazeltine* Petition is whether Government proceedings suspend the running of the Statute of Limitations as to those who are named as co-conspirators in,

but not as parties to, the Government proceedings. 39 U.S.L.W. 3010 (July 14, 1970). Second, in reaching its decision, the Ninth Circuit erroneously extrapolated from recent decisions of the Supreme Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), and *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965). The Supreme Court should clarify its decisions in those cases insofar as they bear on an important question of federal law which has not been, but should be, settled by the Supreme Court. Third, the Ninth Circuit's decision in this case frustrates the congressional design manifested in the Limitations provisions of the Clayton Act, and in permitting a judicial proceeding to have a serious impact upon persons in no way involved in those proceedings raises a serious constitutional question of denial of due process of law. In this regard, the decision of the Ninth Circuit is in conflict with decisions of the Supreme Court on analogous questions.

ARGUMENT.

I. The Ninth Circuit's Decision in This Case Is in Conflict With Decisions in Other Circuits, Including a Decision of the Court of Appeals for the Seventh Circuit in a Case Presently Before the Supreme Court.

Courts before 1955 spoke with one voice in refusing to grant a Section 5(b) suspension where the defendant in the private action had not been involved in the prior proceedings brought by the United States. For example, in *Momand v. Universal Film Exchanges*, 172 F. 2d 37 (1st Cir. 1948), a motion picture exhibitor sought treble damages in a suit against distributors for an alleged conspiracy in violation of the antitrust laws. The Court acknowledged that prior Government proceedings had operated to suspend the running of the applicable Statute of Limitations against defendants who had been parties to those proceedings, but then stated that "[t]he tolling provision does not apply however, to defendant Loew's nor to Columbia, which were not defendants in the government prosecutions." *Id.* at 48. Nothing was "complained of" in the Government proceedings as to to Loew or Columbia, and hence the tolling provision was inapplicable.

Similarly, in *Electric Theatre Co. v. Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937 (W.D. Mo. 1953), the Court concluded that the applicable Statute of Limitations was not suspended against Fox Midwest Theatres, one of several alleged antitrust conspirators, because Fox, "though perhaps an affiliate of Twentieth Century-Fox Film Corporation, was never itself a named defendant in the [prior government] case." *Id.* at 945. Indeed, the year before Con-

gress undertook substantial revision of Section 5 of the Clayton Act, the Court of Appeals for the Seventh Circuit reaffirmed this undisputed conclusion: "We are of the opinion that Section 5 operates to toll the running of limitations during pendency of a government antitrust suit only as to named defendants. . . ." *Sun Theatre Corp. v. RKO Radio Pictures*, 213 F.2d 284, 292 (7th Cir. 1954).

In 1955, Congress amended portions of Section 5(b) of the Clayton Act freely, but it refrained from changing the operative language of that provision in the parts relevant to the question presented in this Petition. As would be expected, therefore, decisions rendered after 1955 continued to hold that the Statute of Limitations in antitrust cases is not tolled by Government litigation as to nonparty, unnamed defendants in such litigation. *See, e.g., Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 176 F. Supp. 527, 536 (D. Minn. 1959); *Court Degraw Theatre, Inc. v. Loew's Inc.*, 172 F. Supp. 198 (E.D.N.Y. 1959).

This rule prevailed unquestioned in all Circuits until three years ago when contrary decisions were handed down by the Courts of Appeal for the Third and Eighth Circuits. In *Hardy Salt Company v. State of Illinois*, 377 F.2d 768 (8th Cir. 1967), the Court held that Section 5(b) tolled the Statute from running against a defendant in a private treble damage action who had been named as a conspirator in a prior Government proceeding but had not been made a defendant to that proceeding. Of course, *Hardy Salt* is not direct precedent for the case at bar since neither Martin Marietta nor O'Malley-Gannaway was ever named as a co-conspirator in the criminal and civil proceedings brought by the United States. However, the District

Court in *Hardy Salt*, 259 F. Supp. 35 (D. Minn. 1966), and the Court of Appeals in *State of New Jersey v. Morton Salt Company*, 387 F.2d 94 (3rd Cir. 1967), held that Section 5(b) suspensions operated against those alleged for the first time to be conspirators—*i.e.*, those who had not even been named in the Government actions.

Two years after these startling decisions of the Third and Eighth Circuits, the Seventh Circuit adhered to the traditional, majority interpretation of Section 5(b). In *Hazeltine Research, Inc. v. Zenith Radio Corporation*, 418 F.2d 21, 25 n.3 (7th Cir. 1969), the Seventh Circuit stated: "[T]he law of this circuit is that the tolling of the limitation protects a plaintiff in a private antitrust suit only with respect to a party defendant in the government suit." The *Hazeltine* case is presently before the Supreme Court and one of the issues that is raised there is closely related to the question raised in this Petition. Indeed, the conflict between the Seventh Circuit's decision in *Hazeltine* and the Ninth Circuit's decision in the instant case is clear. The Ninth Circuit has ruled that Government proceedings may suspend the Statute even as to *nonparties* to those proceedings; the Seventh Circuit has ruled that there is not a suspension as to nonparties nor even to nonparties who were named as co-conspirators in the Government proceedings.

When the suspension issue was considered in the present case, then, there was a split in the Circuits on the question, but only the Third and the Eighth Circuits had departed from the time-honored interpretation of Section 5(b) which did not permit suspensions to operate against nonparties to the Government proceedings. Indeed, the District Court below, citing *Steiner v.*

20th Century-Fox Film Corp., 232 F.2d 190 (9th Cir. 1956), conceded that prior to its decision the Ninth Circuit would not have permitted Government proceedings to suspend the Statute with respect to defendants Martin Marietta and O'Malley-Gannaway, who were in no way involved in the prior Government proceedings (Appendix A at 19). Nevertheless, the District Court concluded—unwarrantedly we submit—that the intervening decisions of the Supreme Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), and *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965), compelled a contrary decision in the instant case.

The conflict among the Circuits on this question is reflected in the Ninth Circuit's disposition of the matter. In its *per curiam* opinion, the majority affirmed the order of the District Court denying petitioners' motion for summary judgment "on the grounds stated in the dirstrict court's opinion. . . ." (Appendix B at 25). But, on the question presented in this separate Petition, and on that question alone, Judge Hamley dissented from the majority's opinion. In his partial dissent, Judge Hamley stated:

> "In my view, the pendency of federal government civil and criminal actions cannot toll the running of the statute of limitations, as to persons or companies not named or complained of in such government actions.
>
> "The tolling statute, section 5(b) referred to above, limits tolling to private actions 'based in whole or in part' on any matter complained of in the government criminal or civil proceeding. Insofar as [Martin Marietta and O'Malley-Gannaway] are concerned, the instant case is not, in my opin-

ion, based in whole or in part on any matter complained of in the prior government actions.

"I recognize that the decision in *State of New Jersey v. Morton Salt Company*, 387 F.2d 94 (3d Cir. 1967) supports the view of the majority. It is no doubt true, as held in *Morton Salt*, that the tolling provision was enacted for the benefit of private parties who were injured. But I am not persuaded that Congress intended that provision to override, as to persons and companies in no way involved in the prior government antitrust suits, the salutary policy behind section 4B, as a statute of repose." (Appendix B at 26-27.)

The suspensive effect of Government proceedings on the four year Statute of Limitations applicable to private treble damages suits is an important aspect of the federal statutory system of antitrust regulation, and the question presented here is likely to recur frequently. Accordingly, Certiorari should issue to review the decision of the Ninth Circuit in this case in order to resolve the conflict in the Circuits on the question whether, under Section 5(b) of the Clayton Act, Government proceedings suspend the operation of the Statute of Limitations on private treble damage actions as to persons in no way involved in the Government proceedings. It is particularly important to resolve this conflict in view of the Congressional purpose in enacting a federal Statute of Limitations to replace the former practice of applying the forum state's statute to federal antitrust claims. That Congressional purpose of uniformity is obviously frustrated by a conflict in the Circuits on the question presented in this Petition. And the time for resolution is now ripe, in light of the Supreme

Court's present review of the *Hazeltine* case on certiorari to the Seventh Circuit. The present case should be consolidated with *Hazeltine* for decision by the Supreme Court.

2. On a Question Which Never Has but Should Be Decided by the Supreme Court, the Ninth Circuit's Decision Is Based on Erroneous Extrapolation From Two Decisions of the Supreme Court.

The Ninth Circuit and the District Court have seriously misconstrued and misapplied decisions of the Supreme Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), and *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965). The Ninth Circuit, in adopting the District Court's opinion by reference, concluded that these Supreme Court decisions *compelled* the decision that Government proceedings suspend the running of the Statute of Limitations even as to individuals in no way involved in those proceedings. Yet, it is unquestioned that *nothing* like the question presented in this Petition was involved in either of these Supreme Court decisions. Indeed, it is clear that the question raised here has never been decided by the Supreme Court.

In *Leh*, the sole question was whether a private treble damage suit, brought against only six of the eight defendants in a prior Government action, satisfied the requirement of Section 5(b) that the private suit must be based "in whole or in part on any matter complained of in said [Government] proceeding." The Court answered this query in the affirmative. But the important thing to note about *Leh* is that *all* of the defendants in the private suit had been parties defendant in the earlier Government proceeding, so that the

only question presented there was whether a suspension would be available if *fewer* defendants were sued in the private action than had been parties to the Government proceedings. In light of the potential prejudice and unfairness which will result if a suspension operates against a *nonparty* to the Government proceeding, the decision in *Leh* can have no meaningful bearing on the issue presented in the present case.

Despite the fundamental disparity between the issue involved in *Leh* and that involved in the case at bar, the District Court indiscriminately applied language used by the Supreme Court in *Leh:*

> "The Supreme Court, in *Leh*, however, held that the 'private plaintiff is not required to allege that the same means were used to achieve the same conspiracies by the *same defendants* (emphasis added). Rather, effect must be given to the broad terms of the statute itself—"based *in whole or in part on any matter* complained of"' (italicized in original). . . ." App. A at 19.

While this language makes perfectly good sense in the context of the facts confronting the Supreme Court in *Leh*, the notice-policy of the Statute of Limitations calls for an entirely different analysis where the private antitrust plaintiff asserts that pendency of the Government proceedings suspends the operation of the Statute as to persons *in no way involved in those proceedings.*

The District Court's reliance on the Supreme Court's decision in *Minnesota Mining* is equally misplaced. That decision simply answered in the affirmative the question whether proceedings instituted by the Federal Trade Commission under Section 7 of the Clayton Act are "proceedings brought by the United States"

for purposes of tolling the running of the Statute of Limitations under Section 5(b). Whether 5(b) operates against nonparties to FTC or other Government proceedings was *not* presented to, argued before, or even considered by the Supreme Court.

While the Supreme Court decisions in *Leh* and *Minnesota Mining* clearly do not require the conclusion drawn by the District Court in the case at bar, it is equally clear that the District Court, the Ninth Circuit, and the Third and Eighth Circuit *believe* that their resolution of the question presented in this Petition is compelled by these Supreme Court decisions. For reasons which are set forth fully below, the rule articulated by the Ninth Circuit is seriously erroneous. Certiorari should issue for the purpose of making it clear that the Supreme Court's decisions in *Leh* and *Minnesota Mining* not only do not compel the rulings rendered by the Ninth Circuit in the case at bar, and by the Third and Eighth Circuits in *Morton Salt, supra,* and in *Hardy Salt, supra,* but in fact will not countenance them.

3. The Ninth Circuit's Decision in This Case (a) Subverts the Purpose of the Clayton Act Statute of Limitations Without Promoting the Congressional Goal Served by the Suspension Provision; (b) May Operate to Deprive Petitioners of Property Without Due Process of Law; and (c) Is Inconsistent With Decisions of the Supreme Court on Analogous Questions.

The majority *per curiam* opinion of the Ninth Circuit overturns a time-honored doctrine on the basis of Supreme Court decisions which not only do not lead to such a harsh result, but which probably would not conscience it. That opinion misinterprets the congres-

sional purpose in enacting the tolling provisions, frustrates the purpose served by the Statute of Limitations, and imposes an intolerable and unnecessary burden on private action defendants.

a. The Ninth Circuit's Decision Misinterprets and Frustrates the Congressional Pattern of Limitations.

Although inquiry into "congressional intent" for purposes of applying a statute is a hazardous venture in many cases, in the present case all rational approaches to the interpretation of Section 5(b) of the Clayton Act require a reversal of the Ninth Circuit's decision. *First*, reading the suspension provision for the "plain meaning" of its words, attention is immediately directed to the requirement that the private treble damage suit which attempts to take advantage of a prior Government proceeding must be "based in whole or in part on any matter *complained of* in said proceedings." (Emphasis added.) Where, as here, a private action defendant is not named in the Government proceeding as either a defendant or a co-conspirator, the conclusion is inescapable that nothing has been "complained of" as to that defendant so as to toll the Statute.

Second, in examining the legislative history of Section 5(b), the most important piece of information with respect to that Section was the congressional determination when Section 5 was substantially rewritten in 1955 to leave Section 5(b) unchanged in the face of decisions unanimously and unequivocably holding that there is no suspension as to private action defendants who were not involved in the Government proceedings. While in many situations congressional inaction or silence may be regarded as irrelevant, when Congress heavily amends and rewrites a statutory provision and

leaves a portion of that provision unchanged, the reasonable inference is that Congress is satisfied, if not pleased, with the operation of that unchanged portion.

Third, in inquiring into how this case should be decided in light of the particular evil against which Congress was legislating, it is readily apparent that enactment of a Statute of Limitations on private treble damage actions manifests a clear congressional recognition of the legitimacy of the potential antitrust defendant's interest in having certain reasonable limitations imposed on his exposure to liability. The problem is therefore one of reconciling this congressional policy of repose, expressed in Section 4(b) of the Clayton Act, with the purpose underlying the suspension provision of Section 5(b).

The entire purpose of a statute of limitations is to insure fairness to the defendant—to insure that he will not have to defend against stale claims. *See Burnett v. New York Central R.R.*, 380 U.S. 424 (1965). This purpose is not subverted when the suspension operates against parties actually involved in prior Government proceedings—they will be put on notice of the claims to be asserted against them and will have reviewed the exculpatory evidence, examined their files and preserved their records. In addition, the Government proceedings are likely to be of value to the private action plaintiff in preparing his case against these defendants—which, after all, is one of the primary purposes of the tolling provision. For those reasons, the Supreme Court's decisions in *Minnesota Mining* and *Leh* are consistent with the statutory pattern of Limitations: *all* of the treble damages defendants in those cases had been parties-defendant to the prior Government proceedings.

But where, as in the instant case, the private action defendants were not involved in prior Government proceedings, to hold that there is a suspension as to them is totally inconsistent with the congressional Limitations pattern. On the one hand, there is no overriding legislative purpose served by permitting a suspension under these circumstances. Any decree rendered in the prior Government proceedings is clearly not available to the private action litigant as *prima facie* evidence under Section 5(a) against a nonparty to those proceedings, and the chance that much evidence will be accumulated in Government proceedings against nonparties to those proceedings is extremely remote. On the other hand, and even more important, the Ninth Circuit's construction of the suspension provision is inconsistent with the congressional purpose underlying the Statute of Limitations and works a substantial hardship on potential private action defendants.

If the Ninth Circuit's decision is left standing, two serious consequences are likely to follow. In the first place, potential private action defendants not involved in any way in the Government proceedings *may not* take the measures necessary to preserve relevant evidence, since unlike parties to the Government suit they are under no compulsion to prepare a defense and may not even have notice of possible claims against them. This evil is obviously one against which the Statute of Limitations is directed, and hence if a distinction is not drawn for purposes of the suspension provision between parties and non-parties to the prior Government proceedings, the statutory pattern will be frustrated.

In the second place, potential private action defendants not involved in the Government proceedings *may* learn of the pendency of those proceedings and under-

take extremely burdensome measures to prepare for the possibility of future private antitrust litigation. But the social and economic costs of compelling all individuals in an industry to be prepared for private antitrust litigation growing out of Government antitrust suits at some undetermined time in the future are staggering. Such potential economic and social waste must be avoided by interpreting Section 5(b) as providing for a suspension of the Statute of Limitations only as to parties involved in the Government proceedings which give rise to the suspension.

In short, the interpretation of Section 5(b) adopted by the Ninth Circuit is shocking in its unfairness, and short-sighted in its disregard of long-term social and economic consequences. The *per curiam* decision of the Ninth Circuit is particularly indefensible if the hardship to potential litigants under the present ruling is measured against the potential hardship to potential plaintiffs under a contrary ruling. First, the principal offenders are likely to be named in any Government antitrust proceeding, so that the Statute of Limitations will not run on plaintiff's cause of action against them. And, second, plaintiff can preserve his cause of action against other potential defendants, and reap whatever limited benefits flow from the Government proceedings as against defendants not involved in those proceedings, by bringing suit against them and requesting the Court to stay that suit pending the outcome of the Government litigation. This solution would prevent the potential economic waste and fundamental unfairness of the Ninth Circuit's ruling and further what Judge Hamley's dissenting opinion in this case so aptly termed "the salutary policy behind section 4B, as a statute of repose."

b. The Ninth Circuit's Decision May Deprive Petitioner of Property Without Due Process of Law and Is Contrary to Decisions of the Supreme Court on Analogous Issues.

The Ninth Circuit's decision permits Government proceedings to affect adversely the interests of nonparties to those proceedings without the fair and adequate notice of those proceedings which due process of law would seem to require. In *Order of R.R. Tel. v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944), this Court stated:

> "Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have failed, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

The effect of the decision of the Ninth Circuit, then, is to permit a potential antitrust defendant's "right to be free of stale claims" to be affected adversely by proceedings to which that individual is not a party and about which that person may have no knowledge whatsoever. And this is permitted under the terms of that decision despite the fact that the unfairness suffered by potential antitrust defendants under this ruling is not offset by any overriding legislative purpose. The Ninth Circuit's decision therefore seems contrary to concepts of the fundamental fairness in the orderly and timely settlement of disputes to which all litigants should be

entitled, and directly in conflict with determinations of the Supreme Court on a variety of analogous questions.

First, the Ninth Circuit's decision is contrary to the spirit of this Court's landmark decision in *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306 (1950). In *Mullane*, an appeal was taken to the Supreme Court from a judgment of the Court of Appeals of New York affirming a decree in favor of a trust company in proceedings concerning judicial settlement of its trust accounts, where notice of these proceedings was given to the beneficiaries only by newspaper publication. The Supreme Court held that notification by newspaper publication was insufficient to satisfy the requirements of due process as to beneficiaries whose identity and whereabouts could be ascertained in the exercise of due diligence. The Court stated:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

The thrust of this language for purposes of interpreting Section 5(b) of the Clayton Act is plain. It suggests that Government proceedings should not have an adverse impact on a nonparty's "right to be free from stale claims" unless that nonparty has formal notice of those proceedings so that he may undertake the burdensome steps necessary to prepare for private antitrust litigation at some time in the possible distant future.

Second, the Ninth Circuit's decision flies in the face of Rule 15(c) of the Federal Rules of Civil Procedure, adopted by the Supreme Court to regulate the administration of civil suits in United States District Courts. Rule 15(c) provides:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. *An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.*" (Emphasis added).

The primary importance of this Rule, of course, lies in its impact on the running of the applicable Statute of Limitations. If an amendment changing the party against whom a claim is asserted is permitted to relate back to the date of commencing the suit, in effect a proceeding to which an individual was not originally a party operates to toll the running of the Statute of Limitations as to him, just as a Government proceeding tolls the running of the Statute as to nonparties under the Ninth Circuit's decision in the present case. However, there is an obvious and fundamental difference between Rule 15(c) and the Ninth Circuit's de-

cision in this case. Under the Rule, a civil action operates to toll the running of the Statute of Limitations as to a nonparty to that action *only if* that nonparty "(1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." These prerequisites to obtaining a "suspension" by relation-back of an amendment adding a party under Rule 15(c) obviously insure against the unfairness which would otherwise result if an action against one defendant were held to suspend the running of the Statute of Limitations as to all individuals who are potential defendants. In fact, these prerequisites are so restrictive that only in an extremely rare case will commencement of an action against one defendant be permitted to toll the running of the Statute of Limitations against a nondefendant. *See, e.g., Graves v. General Insurance Corp.*, 412 F.2d 583, 585 (10th Cir. 1969). And, both of these prerequisites seem to reiterate due process standards—an action may not have an adverse impact on a person unless he (a) had notice of that action, (b) knew of his involvement in it [Rule 15(c)(2)], *and* (c) would not be prejudiced by being required to defend after the Statute of Limitations has run [Rule 15(c)(1)]. Obviously, neither of these limitations is attached as a condition precedent to application of the Ninth Circuit's decision on the question presented in this Petition and hence that decision is fundamentally defective.

Third, the Ninth Circuit decision in this case is in conflict with the entire body of law defining the *res judicata* effect to be given to judicial determinations as

against individuals who were in no way involved in the proceedings. The broad principle that individuals not before a tribunal will not be bound by its judgment is reflected, for example, in Rule 23, Federal Rules of Civil Procedure. Under that rule, absentee members of a class may be bound by a judgment rendered with respect to that class, but only if their interests are fully and fairly represented [*see Riley v. New York Trust Co.*, 315 U.S. 343, 353-354 (1941); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)], and then only if efforts have been made to notify them formally of the pendency of the action and of its possible impact upon their interests. Once again, the decision of the Ninth Circuit is inconsistent with this rule and with the multitude of cases which outline the law of *res judicata* as it relates to strangers to prior litigation:

Conclusion.

This Petition raises an important federal question which has never been decided by the Supreme Court, and a substantially identical question is presently before the Court in *Hazeltine*. A consolidation of this Petition with the *Hazeltine* case would highlight the conflict which presently exists in the Circuits concerning the interpretation to be given to Section 5(b) of the Clayton Act. This conflict is a serious impediment to achieving the uniformity in limitations on private treble damages suits which prompted Congress to substitute Section 4(b) of the Clayton Act for the prior practice of resort to state statutes of limitations in federal antitrust actions.

To avoid raising the serious due process question presented in this Petition, the Ninth Circuit should have interpreted the suspension provided by Section

5(b) of the Clayton Act to be available only against those who are parties, or at last named co-conspirators, in the Government proceedings, as did the Seventh Circuit in *Hazeltine*. For this reason and all the reasons stated above, Certiorari should issue to the Ninth Circuit to review its divided decision on this question.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States District Court for the District of Arizona.

United States District Court, for the District of Arizona.

Maricopa County, Plaintiff, v. American Pipe and Construction Co., et al., Defendants. Civ. A. No. 69-149 PHX.

[August 1, 1969]

On Defendants' Alternative Motions to Dismiss and for Summary Judgment.

Before: Pence, District Judge.

The defendants above named have each and all filed motions to dismiss and/or for summary judgment against the plaintiff, maintaining that its Sherman 1 and 2 antitrust action is barred by the statute of limitations and laches. Some defendants have raised additional grounds, fully discussed hereafter. The chronological sequence of events preceding the filing of plaintiff's action on April 19, 1969, and its amended complaint on May 22, 1969 is therefore important.

CHRONOLOGY OF EVENTS

On March 10, 1964, the United States Grand Jury at Los Angeles returned five indictments against defendants American Pipe and Construction Co. (American), United Concrete Pipe Corporation (United), Kaiser Steel Corporation (Kaiser), United States Steel Corporation (U. S. Steel), United States Industries (USI), and Smith-Scott, Inc. (Smith-Scott), charging them (and certain of their officers) with combining and conspiring together in restraint of interstate trade in steel and concrete pipe, in violation of 15 U.S.C. § 1 (Sherman 1),

in that they submitted collusive and rigged bids for the sale of such pipe, and allocated and divided business among themselves.[1] On June 19, 1964, pleas of *nolo contendere* were made by all defendants and judgments of guilt were entered.

On June 23, 1964—four days later—the government filed civil actions in the United States District Court at Los Angeles against the same defendant corporations. In C.A. 64832, American and United were named defendants; in C.A. 64833, Kaiser and U.S. Steel were named defendants; in C.A. 64834, United, American, Kaiser and U. S. Steel were named defendants; in C.A. 64835, USI, Smith-Scott, U. S. Steel, American and United were named defendants; in C.A. 64836, U. S. Steel, Smith-Scott and USI were named defendants.[2] In these five government civil actions the United States predicated the complaints upon 31 U.S.C. §§ 231-233 (False Claims Act) and 15 U.S.C. § 15a (Clayton 4A). The complaints were based on the facts uncovered by the government in preparing its criminal indictments. On October 28, 1964, the government amended each of its five complaints by adding a new count under 15 U.S.C. § 4 seeking to restrain continuing violations by the defendants of Section 1 of the Sherman Act.

Some two years later, on December 8, 1967, with the consent of each defendant except American, a "Partial

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[1]Some of the indictments also stated that Southwest Welding and Manufacturing Company, American Concrete Pipe Co., of Phoenix, Arizona, Pipe Linings Inc., "and various other companies * * * not made defendants in this indictment, participated as co-conspirators in the offense charged." *E. g.*, Indictment, Cr. 33340 (S.D.Cal.).

[2]Each complaint concerned itself with differing sizes of pressure and nonpressure steel and/or concrete pipe, but the charges of violations were all essentially identical.

Final Judgment" was entered in each case, i. e., by December 8, 1967, all save American compromised and settled their cases with the United States. These "partial final judgments" enjoined each of the consenting defendants from engaging in enumerated violations of Sherman 1 for five years.

On May 24, 1968, a "Final Judgment" was entered against American—only—in each of the three government cases in which it had been named as a defendant. It is thus clear that although the judgments of December 8, 1967, were called "Partial Final Judgment", they were in fact final judgments as to all named defendants except American.

In 1961, a Clayton 7 divestiture action was brought by the Federal Trade Commission (FTC) against Martin-Marietta Corporation (Martin-Marietta), and on March 12, 1963, a consent decree was entered, ordering not only divestiture by Martin-Marietta of certain named concrete pipe and other plants within twenty-four months but also placing a ten-year restraint on Martin-Marietta against acquisition of similar plants.

On August 21, 1967, the cities of Phoenix, Mesa, Tucson, Tempe, Scottsdale and Flagstaff, and the towns of Goodyear and Showlow, all Arizona municipal corporations, filed a Sherman 1 and 2 violation complaint in the District of Arizona, similar to the one filed by the plaintiff herein, denominated a "class action", against American, American Concrete Pipe Co. (American Concrete),[2a] Kaiser, Smith-Scott, United, USI and U. S. Steel. The State of Arizona, through

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[2a]For the purpose of this decision, American and American Concrete are considered one and the same, and the term "American" as used hereafter applies to both.

its Attorney General, as a subsequent intervening party plaintiff in that action, thereafter on September 20, 1968 entered into a covenant not to sue with defendants U. S. Steel, Kaiser and USI. Due to settlement negotiations, this Arizona "class action" never moved beyond the basic initial proceedings, and no rulings were made by this court on the class action aspect of the case and no intervention was made by any possible member of the "class", except the State of Arizona. The plaintiff here, Maricopa County, never moved to intervene in that action.

On April 19, 1969, plaintiff herein filed its complaint against all of the defendants named in the heading of this case except Arizona Concrete Pipe Co. (Arizona Concrete) and Six Points Lumber & Supply Co. (O'Malley). On May 22, 1969, plaintiff filed its First Amended Complaint against the same defendants named in the original complaint and added Arizona Concrete[2b] and O'Malley. The complaints charged all defendants with the same acts, as violating Sherman 1 and 2, as were delineated in both the government's criminal and civil actions.

DEFENDANTS URGE NINE THEORIES

All defendants maintain (1) that since there was at least a four-day hiatus between the termination of the criminal actions by the government and the filing of government civil actions which did not toll the statute, therefore the tolling period, under § 5(b), within which the plaintiff was privileged to file its suit, terminated on June 18, 1965, i. e., one year after the termination of the criminal actions; and (2) since the

[2b]Arizona Concrete had entered no appearance in this case when defendants' motions were argued on June 16, 1969.

plaintiff alleged that defendants' illegal conspiracies terminated some time in 1962, ergo, the last date upon which plaintiff could have filed, to have any possible cause of action within the four-year statutory period of limitations under Clayton 4B (15 U.S.C. § 15b), would be not later than the end of 1966.[3]

All defendants further maintain (3) that there can be no tacking of successive tolling periods on to that invoked by the government's criminal actions, so that even though the government on October 28, 1964, amended its complaint to add an injunctive count which would normally invoke the tolling provisions of § 5(b), neither can the possible tolling aspects raised by the government's amended complaints be related back under F.R.Civ.P. 15(c) to June 24, 1964, when the government's non-tolling complaints were initially filed, nor can the amended complaints have any tolling effect whatsoever. To do so, defendants argue, would be to tack on successive tolling periods. All defendants, save American, Martin-Marietta and O'Malley, also urge (4) that since final judgments were entered in the government civil action against them on December 8, 1967, the tolling provisions of § 5(b) in any event, ended on December 8, 1968, as to them. Martin-Marietta and O'Malley urge (5) that since they were never named as defendants or co-conspirators in any government action, civil or criminal in the "pipe" cases, neither the criminal nor the civil government actions had any tolling effect upon any cause of action now alleged against them, and since the plaintiff alleges

[3]Although in Paragraph 23 of its First Amended Complaint plaintiff alleges that the defendants acted together to conceal the conspiracy and the acts performed in furtherance thereof, the complaint does *not* allege fraudulent concealment from the plaintiff as a basis upon which the statute might be tolled.

the conspiracy terminated some time in 1962, the last date upon which plaintiff could have brought the present action was not later than the end of 1966. Martin-Marietta also maintains (6) that (a) the FTC action had no tolling effect as to it, inasmuch as the Clayton 7 action before the FTC was not based in whole or in part on any matter complained of in plaintiff's complaint and § 5(b) did not apply; and (b) even if it did, any possible tolling terminated one year after the entry of the FTC order on March 12, 1963. O'Malley also urges (7) that not only was it never an alleged co-conspirator or defendant in any government action but that also it had never been named a defendant in any end-user complaint filed in Arizona or anywhere else, therefore the tolling provisions of § 5(b) had no application to it.

U. S. Steel, Kaiser and USI also maintain (8) that inasmuch as Maricopa County is a political subdivision of the State of Arizona, and the State, by its Attorney General, entered into a Covenant Not To Sue with them on September 20, 1968, the plaintiff, as such a political subdivision, is bound by that covenant and estopped to bring this present suit.

All parties maintain (9) that the doctrine of laches should be applied because of the late, late filing of the complaint.

APPLICABLE LAW

Of course, the primary problems before this court are (a) whether or not the tolling provision of § 5(b) remained in full force and effect past June 19, 1965, and if so, (b) whether it so continued as to all conspirators named in the government suit except American, after December 8, 1968.

It is settled that if a claim is brought after the running of the statute of limitations and such defect is apparent on the face of the complaint, it is tantamount to a failure to state a cause of action and such "defense" may be raised by a motion to dismiss, but since, as here, there are usually several tolling theories involved, necessitating that the motions be accompanied by reference to matters outside the pleadings, the usual practice is to include a motion for summary judgment together with that for dismissal.[4] These defendants' motions, then, are properly before the court.

Section 4B of the Clayton Act (15 U.S.C. § 15b) recites that suits under §§ 4 or 4A of that Act are "forever barred unless commenced within four years after the cause of action accrued." A cause of action under the Sherman Act accrues when the antitrust laws are violated, and there is a causally related injury to business or property flowing from such violation.[5] A conspiracy of the nature here alleged is a continuing one and is in effect renewed during each day of its continuance.[6] When the cause of action is based on such an alleged unlawful conspiracy, the cause of action accrues and § 4B begins to run upon the occurrence of each overt act causing damage to the plaintiff.[7] Since the complaint here alleges that the conspiracy began "in and about 1954" and continued until some time in 1962 with the overt acts occurring prior to the end of 1962, and the complaint here was filed on April 15, 1969, on the face of the complaint therefore more than four

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[4]Suckow Borax Mines Consol., Inc. v. Borax Consolidated, 185 F.2d 196 (9 Cir. 1950).

[5]Flintkote Co. v. Lysfjord, 246 F.2d 368 (9 Cir. 1957).

[6]United States v. Borden Co., 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

[7]*Suckow, supra* n. 4.

years must have passed since any overt acts could have occurred and plaintiff's claims are therefore barred by reason of the running of the four-year statute of limitations fixed by § 4B unless the statute in this case has been suspended or tolled.

Section 5(b) of the Clayton Act (15 U.S.C. § 16 (b)),* suspends the running of the statute of limitations as to private claims during the pendency of any government civil or criminal antitrust action "based in whole or in part on any matter complained of in" a government proceeding "during the pendency thereof and for one year thereafter." With certainty, therefore, the government criminal indictments, *supra*, put into effect the § 5(b) suspension of the statute as to the defendants named in the indictments and kept alive plaintiff's privilege to sue for any of their overt, illegal acts causing injury to it within the four years prior to the return of the criminal indictments on March 10, 1964. The government's criminal actions were terminated on June 19, 1964, when judgments of conviction were entered therein and the one-year extension of the suspension thereupon started running.

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*"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

The government's False Claims and Clayton 4A actions, as filed June 23, 1964, are expressly excluded from the tolling provisions of § 5(b). With equal certainty therefore, until the government amended its complaints on October 28, 1964, to add a claim for injunctive relief under 15 U.S.C. § 4, the pendency of those first government civil actions had no effect upon the ticking away of the one-year suspension period following June 19, 1964.

DEFENDANTS' THEORIES 1, 2, 3

Defendants maintain that when the suspension provisions of § 5(b) were started up by the return of the indictments on March 10, 1964, no government civil or criminal action filed thereafter would have any effect upon the period of suspension established thereby, i. e., there could be no tacking of tolling periods simply because there might thereafter develop an overlap in government civil-criminal anti-trust proceedings. Defendants' position flows primarily from dicta in Dickinson, Inc. v. Kansas City Star Company, 173 F.Supp. 423 (W.D. Missouri 1959). *Dickinson* involved a private antitrust action filed after the government had "simultaneously commenced a criminal and a civil action against defendants for violation of Section 2 of the Sherman Act." (At 423.) The government criminal action terminated before the government's civil action ended, and the court rejected the defendants' argument that the § 5(b) suspension ended one year after the criminal action terminated. In holding that the plaintiff could take advantage of the *prima facie* effect of the

criminal judgment (the basic question before the court being an evidentiary one), the court gratuitously stated that the result would be otherwise if the two government actions had been successively filed rather than contemporaneously brought:

> "The rule is, that 'successive disabilities may not be tacked to one another so as to bring a party within the exceptions to the statute of limitations.' 54 C.J.S. Limitations of Actions p. 254, § 219." 173 F.Supp. at 425.

Dickinson (at 424), relying on Sun Theatre Corp. v. RKO Radio Pictures, 213 F.2d 284, 290 (7 Cir. 1954) held that the evidentiary benefits of the first paragraph of Clayton § 5 (15 U.S.C. § 16), and the tolling provisions of the second paragraph are "complimentary", and must be construed together. Thus, the court's conclusatory dicta was not illogical—in 1959.

The *Dickinson* dicta was referred to in the excellent decision of Judge Larson in State of Michigan v. Morton Salt Company, 259 F. Supp. 35, 51 (D.Minn. 1966):

> "It may be that in some instances tolling the statute during successive actions would result in treble damage claims of such vintage that it would be patently unreasonable to assume that Congress meant to allow 'tacking' under § 5(b). * * *

But Judge Larson thereafter watered down this postulation by continuing:

> "But here, the civil complaint was filed within two weeks of the indictment. Although not simultaneously commenced, the two actions were pending concurrently. I think this situation falls within permissible limits so that the suspension could continue until the conclusion of the civil suit."

Short of perfectly "concurrent" filings, this court fails to perceive any difference, in their tolling or tacking effect, between successive government antitrust proceedings, one of which may have been filed one minute, one hour, one day, one week, or any period of time after another has been filed.[9]

The "complimentary" and togetherness construction given Clayton §§ 5(a) and 5(b), by *Sun Theatre* and *Dickinson* was discarded and overruled in Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 317, 319, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965) (herinafter cited as 3M), in holding that § 5(b) was completely severable from § 5(a), the court adding: "|T|extual distinctions as well as the policy basis of § 5(b) indicate that it was to serve a more comprehensive function in the congressional scheme of things." (At 319, 85 S.Ct. at 1477.)

Both *3M* and Leh v. General Petroleum Corporation, 382 U.S. 54, 86 S.Ct. 203, 15 L.Ed.2d 134 (1965), state and restate the principle that the scope of § 5(b) is not to be restrictively interpreted.[10] Although the legal concept of tacking successive periods of suspensions followed in Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10 Cir. 1961), was not an issue in *Leh*, *Nisley* was approvingly cited therein. *3M* and *Leh* inferentially, but with certainty, overruled the legal logic and with it the conclusions of *Sun Theatre* and *Dickinson*, that absent "simultaneous" filing of government criminal and civil antitrust actions the "first in first out" rule on tolling would foreclose

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[9]There's no such condition as being *only a little bit* pregnant.

[10]3M, *supra*, 381 U.S. at 319, 322, 85 S.Ct. 1473; Leh, *supra*, 382 U.S. at 56, 59, 86 S.Ct. 203.

any possible overlapping or tacking of tolling emanating from a second and later filed government action.

As this court sees it, *Nisley*, *3M* and *Leh* are dispositive of this problem (and most of the others now before the court). *Nisley* permitted "tacking" to enable two plaintiffs to bring an action in 1958 for overt acts occurring in 1938, violating the antitrust laws, by first giving full effect to the 1942 war-time tolling statutes, 56 Stat. 71, as amended 59 Stat. 306, 10 U.S.C. § 16, under which all statutes of limitations applicable to antitrust violations were suspended until June 30, 1946. Then, in June of 1946, the government filed an antitrust indictment against the defendants which was dismissed upon the filing by the government, in September 1948, of an antitrust criminal information against the same defendants which was not terminated until June 2, 1957. Plaintiffs filed their action within one year thereafter, relying upon § 5 of the Clayton Act. The Court of Appeals in *Nisley* analyzed in depth the rationale and scope intended by Congress to be given § 5(b) when it enacted the same (see 300 F.2d at 568-569), and while holding, on the authority of *Sun Theatre*, the two subsections to be complimentary and should therefore be construed together, decided that they were not "necessarily co-extensive in their frame of reference."[11] 300 F.2d at 569.

> "[T]he textual distinctions as well as the policy basis of § 5(b) indicate that it was to serve a more comprehensive function in the congressional scheme of things. The Government's initial action

[11]On that rationale, the appellate court found that a government antitrust suit was pending (for the tolling purposes of § 5(b)) from the time in 1946 when the criminal indictment was filed until the termination of the suit on the information in 1957. Nisley, *supra*, 300 F.2d at 570.

> may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. * * * Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed so useful is this service that government proceedings are recognized as a major source of evidence for private parties." 381 U.S. at 319, 85 S.Ct. at 1478.

The Court in *Leh*, referring to *Nisley* and *3M*, reaffirmed the rationale of both, restating that it was Congress' " 'belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.' 381 U.S. at 318, 85 S.Ct., at 1477",[19] and that the overriding purpose of the Clayton Act's tolling provision is to assist private litigants in utilizing any benefits they might cull from any government antitrust actions.

3M and *Leh* unequivocally indicate that the language of § 5(b) must be given its broadest application in favor of enabling private litigants to reap every benefit that they possibly can out of any governmental criminal or civil antitrust litigation during the pendency of each and within one year thereafter. Congress has seen fit to extend to private litigants the privilege of waiting until any government action has come to an end and then extend the suspension for an additional one year. This court cannot deny to the plaintiff the fullest use of that congressional privilege.

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[19]Leh, 382 U.S. at 59, 86 S.Ct. at 207.

Defendants cite 54 C.J.S. Limitations of Actions § 219, p. 254, as supporting their contention that the suspension of the four-year statute of limitations terminated on June 19, 1965, and that the filing of the government civil actions *after* June 19, 1964, could not extend nor add to the one-year suspension created by the government's criminal actions. Even a superficial glance at § 219 indicates that the rule that "[s]uccessive disabilities may not be tacked to one another so as to bring a party within the exceptions to the statute of limitations" was intended to apply to several disabilities of the same person, e. g., disability of infancy tacked to disability of coverture or insanity, etc. The case of Givens v. Jones, 158 Okl. 124, 12 P.2d 892, one of the cases cited in support of the rule, involved the problem of minority with subsequent mental incompetency after adulthood. The Oklahoma court correctly stated that the "party claiming the benefit of a disability can only avail himself of the existing disability when the right of action first accrues, *unless the statute provides otherwise.*" (Emphasis added.) 12 P.2d at 894. Not only is the matter now before the court not concerned with several disabilities of the same person, but also the congressional act, suspending the statute of limitations, specifically provides for the suspension during any period that *any* government action is pending and for one year thereafter.

This court recognizes the general rule that "statutes of limitations are statutes of repose and are favored by the courts",[18] and that the underlying purpose "is to force a litigant to get moving, * * * to pursue every

[18]Hamrick v. Indianapolis Humane Society, Inc., 273 F.2d 7, 9 (7 Cir. 1959), *cert. den.* 362 U.S. 919, 80 S.Ct. 671, 4 L.Ed. 2d 739 (1960).

avenue of relief promptly, while the evidence is fresh and the witnesses are available",[14] and that it was with this in mind, as well as for other reasons, that Congress fixed the statute of limitations in antitrust cases at four years. Having so fixed the statute of limitations, Congress could have topped right there—but it didn't. Congress, with deliberation and specificity, disturbed that "repose" and overrode that purpose by enacting § 5(b), to make manifest that in encouraging the enforcement of the antitrust laws by private litigation, tolling of the statute was more important than the repose established thereby.

By § 5(b) Congress has said that so long as "*any* government proceedings" (emphasis added) were pending and for one year thereafter, antitrust claims were not stale and could be enforced. In balancing the equities of plaintiff and defendant in repose and tolling, Congress deliberately weighted the law in favor of the private plaintiff and not the antitrust defendant. While the logic of the policy generally underlying a statute of limitations is to assure fairness to the defendants, who must bear the burden of suit, Congress made antitrust actions an exception to the general rule and instead made antitrust defendants fair game for the private plaintiff to shoot at for one year after the end of *any* government antitrust proceedings.

This court is not here faced with or considering the classical legal concept of tacking successive disabilities. The use of the term "tacking" in the context of § 5(b) is statutorily inapplicable if the congressional policy so definitively stated in *3M* and *Leh* is to be given the

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[14]Dedmon v. Falls Products Incorporated, 299 F.2d 173 (5 Cir. 1962).

broad use and effect desired by Congress. Here, this court can be and is only concerned with the implementation of that congressional policy of giving every opportunity to private plaintiffs to enforce the antitrust laws. It was upon this last broad concept that *3M* extended § 5 (b) to include not only governmental criminal actions and civil actions stemming from the same facts upon which criminal charges were based, but also to FTC actions, if private antitrust litigation thereafter undertaken was based in whole or in part on any matter complained of in *any* such government antitrust proceeding.[15]

Congress made no distinction between government civil or criminal antitrust proceedings nor cared when either was filed. Any such governmental proceeding stands on its own legislative foundation and carries its own severable tolling provisions with it. If the periods of the government actions happen to overlap, the end of one tolling period following the termination of a government action does not in any wise disturb or curtail the free flowing river of suspension created by and welling from the filing of any government antitrust proceedings. Private antitrust litigation may be filed at any time prior to one year after the termination of *any* criminal or civil proceedings, whenever the same may have been filed, concurrently or successively. As indicated, if two or more periods of tolling happen to overlap, as is here the case, then since the statutory tolling period has never become moribund nor buried, the tolling provisions continue to be viable until the end of the one-year extension following the termination of the last government action to end.

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[15]Excepting, of course, 15 U.S.C. § 15a actions.

One caveat, however, is illustrated by the present case. Presupposing that before that one year period of suspension following the termination of criminal actions had ended, i. e., June 19, 1965, the government had filed its same False Claims and § 4A actions (as was here done), and *after* June 19, 1965, the government had then amended its civil actions to add an antitrust injunctive count, this court would have no hesitancy in stating that the insertion of the injunctive antitrust count by amendment would not revive any claims already made moribund by the termination of the one-year extension. "What is dead, is dead", and an attempted heart transplant by the relation-back theory on amendments under F.R.Civ.P. 15(c) would not revive the cause of action.[16] That, however, is not the situation here.[17] The one-year suspension period following June 19, 1964, had *not* ended, when on October 28, 1964, the government amended its complaint to file the injunctive count, so this court is not called upon to decide the effect of FR..Civ. P. 15(c) on an already demised cause of action.

DEFENDANTS' THEORY 4

Inasmuch as the government's antitrust injunctive count was filed within one year from the date of the end of the government's criminal actions, the period of suspension of the four-year limitation period never died but continued on to the advantage of any laggardly plaintiff for not only one year after December 6, 1967,

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[16]*Cf.* Nisley, 300 F.2d at 571, Salyers v. United States, 257 F. 255 (8 Cir. 1919); Standard Oil Co. v. Perkins, 396 F.2d 809 (9 Cir. 1967), rev'd on other grounds, 395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed. 2d 599 (1969).

[17]If the government filed a new action under 15 U.S.C. § 4 after the one year had expired, the result, of course, would be the same.

when final judgments were filed as to all defendants named in the government's civil actions save American, but also continued its tolling effect until one year after final judgment in the case involving American.

There is no question but that by this holding, defendants U. S. Steel, Kaiser, United, Smith-Scott and USI are badly hurt because of the failure of American to settle out with the government at the same time in 1967 that they did. Unfortunately for them however, by their prior conspiratorial actions they had become solidly chained to American until all government cases were terminated and were, willy-nilly, dragged along into their present predicament by the stubborn refusal of American to conclude its case with the government when they did. Since plaintiff's action is based almost wholly upon the same conspiratorial acts alleged by the government in both its criminal and civil actions, the statute of limitations thus remained tolled as to all defendants named in the government actions until one year after the government's civil case against American had terminated, viz., until May 24, 1969. The plaintiff, having filed its action against those defendants on April 15, 1969, therefore gains the fullest advantage of the tolling provisions of § 5(b), in the optimum implementation of the congressional policy as interpreted in *3M* and *Leh*.

DEFENDANTS' THEORIES 5 and 7

Martin-Marietta and O'Malley, however, were not defendants in the government suit nor were they named as co-conspirators. A comparison of the allegations in plaintiff's complaint, here, with the government complaints, makes it manifest, however, that the alleged conspiratorial acts of these two defendants were en-

twined with and fundamentally the same as those of the defendants named in the government actions; with certainty, plaintiff's claims against them are "based in whole or in part" on the violations alleged in the government actions. 15 U.S.C. § 16(b). Prior to *Leh*, in the Ninth Circuit, this similarity probably would *not* have been sufficient to toll the statute as to them. Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9 Cir. 1956), demanded that under § 5(b) a "'greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants.' 232 F.2d at 196."[18] The Supreme Court in *Leh*, overruled *Steiner*. The Court of Appeals, in *Leh*,[19] in following *Steiner*, had concluded that the running of the statute of limitations was not suspended because "there were not only different overt acts charged, but different conspiracies, occurring at different times, between different parties."[20] The Supreme Court, in *Leh*, however, held that the "private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the *same defendants* (emphasis added). Rather, effect must be given to the broad terms of the statute itself—'based *in whole or in part* on *any matter* complained of'" (italicized in original), and continued: "[T]he courts must not allow a legitimate concern that invocation of § 5(b) be made in good faith to lead them into a niggardly construction of the statutory language * * *."[21]

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[18]382 U.S. at 57, 86 S.Ct. at 206.

[19]330 F.2d 288 (9 Cir. 1964).

[20]*Id.* at 301.

[21]382 U.S. at 59, 86 S.Ct. at 207.

If more were needed, the Supreme Court, in *Leh*, referred back to *3M* and found that the difference in parties did not prevent a tolling of limitations as to *3M*, since the private plaintiff's Sherman Act claims set up substantially the same claims as were presented by the government in the Clayton Act proceedings before the FTC. The Court concluded:

> "Just as in *Minnesota Mining* the differences between Sherman Act and Clayton Act proceedings were held not to require the conclusion that the private action under the Sherman Act was not based in part on any matter complained of in the Government's § 7 suit, so here we cannot conclude that a private claimant may invoke § 5(b) only if the conspiracy of which he complains has the same breadth and scope in time and participants as the conspiracy described in the government action on which he relies. Here there is substantial identity of parties, six of the seven defendants in this case being defendants in the government suit as well. In suits of this kind, the absence of complete identity of defendants may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matters of which the Government complained. In the interim between the filing of the two actions it may have become apparent that a party named as a defendant by the Government was in fact not a party to the antitrust violation alleged. Or the private plaintiff may prefer to limit his suit to the defendants named by the Government whose activities contributed most directly to the injury of which he complains. On the other hand, some of the conspirators whose activities in-

> jured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net."[33]

So here, the two defendants, Martin-Marietta and O'Malley, though never mentioned in the government actions, nevertheless are also caught by the gills with the other alleged co-conspirators who became entangled in the government's net.[33]

DEFENDANTS' THEORY 8

The covenant not to sue executed by the State of Arizona in favor of U. S. Steel, Kaiser and USI purported to bind the State of Arizona, its departments, agencies and entities, to refrain from suing the three corporations for any antitrust "pipe" claims it might have against them and any overt acts of the three defendants prior to June 20, 1968. It is noted that the State actually intervened as a party plaintiff in the action brought by the cities of Phoenix, Mesa, Tempe, etc., and the towns of Goodyear and Showlow.[34] Thus the State certainly purported to be an entity separate from the cities and towns within it. Under Arizona Revised Statutes § 11-202 each county in Arizona is a body politic and corporate, and by A.R.S. § 11-532 a county's attorney is given the authority to sue on behalf of that county. A.R.S. § 41-192 gives the State Attorney General of Arizona the power to coordinate the legal services required of other departments of the State or other State agencies. This last power apparently gives to the Attorney General the

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[33]*Id.* at 63-64, 86 S.Ct. at 209.

[33]See also Morton Salt, *supra*, 259 F. Supp. at 53-55.

[34]U.S. Steel Exhibit G, p. 406.

power to bring actions on behalf of the counties only when the county specifically requests the Attorney General to so represent it.

Plaintiff's Exhibit 2 shows that the State Attorney General at no time represented Maricopa County in the Phoenix, et al., case, nor was he ever requested to so represent Maricopa County. The State of Arizona did not intervene in the City of Phoenix case as a party in a class. The State of Arizona's covenant not to sue had no relationship to nor effect on the present action brought by Maricopa County."

DEFENDANTS' THEORY 9

All defendants maintain that in any event plaintiff's cause of action is barred by laches. It was laches which apparently concerned Judge Larson in *Mowon Salt* when he said:

> "It may be that in some instances tolling the statute during successive actions would result in treble damage claims of such vintage that it would be patently unreasonable to assume that Congress meant to allow 'racking' under § 5(b)." 259 F. Supp. at 51.

Assuming arguendo that laches might be a defense to an action at law,[25] nevertheless, Royal Air Properties,

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[25]Defendants U. S. Steel, Kaiser and Martin-Marietta have raised the issue that because this court set a cutoff date for intervention in some seven class actions filed in the states of Hawaii, Washington, Oregon and California, and such actions were subsequently settled, therefore the failure of plaintiff herein to have intervened therein before that cutoff date., in some manner forecloses it from bringing the present action. The several class actions involved in the 1965 cutoff order of this court, on the face of each complaint affected thereby, limited the parties of the class to the public agencies in each of the above several states. The plaintiff here was never officially notified of the pendency of these class actions, nor did it join in the same.

[26]Cf. Shultz v. Manufacturers & Traders Trust Co., 40 F.Supp. 675 (W.D.N.Y. 1941).

Inc. v. Smith, 312 F.2d 210, 214 (9 Cir. 1962), on laches in general, and *Nisley* on laches particularly applies to antitrust actions, hold that federally created statutes of limitation are not to be curtailed or cut short. The congressional intent that there must be preserved to the private litigant every possible benefit he can glean from any antitrust laws is the underlying and ever present factor in our decision-making process."

Moreover, the equitable doctrine of laches is addressed to the discretion of the trial court to be determined by the particular circumstances of the case then before the court, the crucial consideration being whether there has been such a lapse of time as would do an injustice to the defendants if plaintiff's action were permitted to stand." While the claims of the plaintiff involved purchases of pipe made by it prior to the end of 1962, it is not now urged by any of the defendants that they have no records of sales dating that far back. To the contrary, this court would take judicial notice of the fact that the records of sales transactions of the several defendants here have been produced, dating as far back as 1954, in the actions of the almost 400 plaintiffs filed in the various districts of the Ninth Circuit between 1964 and 1969, upon all of which cases this judge has sat. The circumstances of the alleged conspiracies, the documents and parties involved, have been developed in depth, and documents and depositions of the alleged conspiring parties are still readily available to each and every defendant. The lapse of time, in this case, in no wise affects the

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"Cf. also United States v. Manufacturers Hanover Trust, 229 F.Supp. 544, 565 (S.D.N.Y. 1964).

"Refrigerated Transport Co. v. United States, 297 F.Supp. 5, 7 (N.D.Ga. 1969).

defendants' ability to respond to the plaintiff's complaint.

The defense of laches is here unavailable to the defendants.

DEFENDANTS' THEORY 6

This court's disposition of the statute of limitations problems as the same affect Martin-Marietta, makes it unnecessary for this court to pass upon plaintiff's allegations that the FTC proceedings, based on a violation of Clayton 7, filed January 27, 1961, followed by a consent order of that Commission on March 12, 1963, suspends the running of the statute of limitations against Martin-Marietta in this case, because the order of divestiture gave Martin-Marietta 24 months to dispose of certain plants and enjoined certain acts by Martin-Marietta for a period of 10 years.[20] As indicated by this court during oral argument, however, the FTC action is inapplicable. Not only were the alleged monopolistic acts of Martin-Marietta in the FTC's Clayton 7 complaint not even in part concerned with any of defendants' acts in violation of Sherman 1 and 2 as here alleged by plaintiff, but also the FTC order of divestiture and injunction, on March 12, 1963, terminated that proceeding for the purpose of § 5(b), even though a few implementary housekeeping chores were continued thereafter.

Defendants' motions to dismiss or for summary judgment are denied.

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[20] Cf. *3M* and *Leh*, *supra*; *Sun Theatre*, *supra*, 213 F.2d at 292.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Maricopa County, Plaintiff-Appellee, v. American Pipe and Construction Co., et al., Defendants-Appellants. No. 24,737.

[August 28, 1970]

Appeal from the United States District Court for the District of Arizona.

Before: HAMLEY and BROWNING, Circuit Judges, and THOMPSON, District Judge.*

PER CURIAM:

We affirm the order of the district court denying appellants' motion for summary judgment. We affirm on the grounds stated in the district court's opinion, except that we do not pass upon the soundness of the district court's dictum that a government antitrust proceeding filed more than one year subsequent to the termination of a prior government antitrust proceeding could not toll the running of the statute of limitations on private treble damage actions. Nor do we pass upon the contention, made for the first time in a reply brief in this court, that a partial summary judgment should have been granted because American Pipe and Construction Company was not named as a defendant in two of the five civil actions commenced by the government. We see no reason to depart from the general rule that a district court judgment should not be re-

*Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

versed on grounds not raised below. Our affirmance is without prejudice, however, to the filing in the district court by appellants of a motion for partial summary judgment raising this new issue.

HAMLEY, J., (dissenting in part):

I concur in the majority opinion except insofar as it affirms the denial of the motion of Martin Marietta Corporation and Six Points Lumber & Supply Co., dba O'Malley-Gannaway Concrete Pipe Co.

The motion for dismissal of the action was made by these two defendants on the ground that plaintiff's claims against them are barred by the four year statute of limitations provided by section 4B of the Clayton Act, 15 U.S.C. § 15b. The district court rejected this ground for dismissal on the theory that, under the facts of this case, this statute of limitations was tolled by the provisions of section 5(b) of the Clayton Act, 15 U.S.C. § 16(b), in view of certain prior federal government civil and criminal proceedings.

Neither of the above-named defendants were ever named or complained of as defendants or co-conspirators in the prior civil and criminal actions brought by the federal government. In my view, the pendency of federal government civil and criminal actions cannot toll the running of the statute of limitations, as to persons or companies not named or complained of in such government actions.

The tolling statute, section 5(b) referred to above, limits tolling to private actions "based in whole or in part" on any matter complained of in the government criminal or civil proceeding. Insofar as these two

defendants are concerned, the instant case is not, in my opinion, based in whole or in part on any matter complained of in the prior government actions.

I recognize that the decision in *State of New Jersey v. Morton Salt Company*, 387 F.2d 94 (3d Cir. 1967) supports the view of the majority. It is no doubt true, as held in *Morton Salt*, that the tolling provision was enacted for the benefit of private parties who were injured. But I am not persuaded that Congress intended that provision to override, as to persons and companies in no way involved in the prior government antitrust suits, the salutary policy behind section 4B, as a statute of repose.

APPENDIX C.

Decree.

United States Court of Appeals, for the Ninth Circuit.

Maricopa County, Plaintiff-Appellee, v. American Pipe and Construction Co., et al., Defendants-Appellants. No. 24737.

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 28, 1970.

APPENDIX B.

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, October 26, 1970.

Before: Hamley and Browning, Circuit Judges, and Thompson, District Judge.

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petitions of Appellants filed September 10, 1970 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.